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Constitutional Law -- A New Constitutional Right To An Abortion

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This area of the law must necessarily remain unsettled until the larger questions of inter-school integration are answered. When issues such as busing are finally laid to rest, the Supreme Court may choose to advance further in this field by putting a premium on protection of the individual child's learning experience. Any system relying on testing will make errors in placement from time to time. Whether the judicial system will choose to tolerate these mistakes as incidental to the benefits derived from an objective standard of placement remains for the future.

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Constitutional Law—A New Constitutional Right To An Abortion

The controversy concerning legalized abortion has been active in the United States for almost twenty years. The medical profession, legislators, and the judiciary have wrestled with the legal, moral, and social conflicts involved in the abortion issue. Recently in *Roe v. Wade*[1] and a companion case[2] the United States Supreme Court determined that the right of privacy inherent in the due process clause of the fourteenth amendment protected a woman's right to choose whether or not to

Id. at 511. It is unclear why such a distinction is drawn, in *Hobson* (in form) and in *Riles* (in fact), when all the classifications are based on race. The present test for testing the constitutionality of ability grouping therefore appears to be the rational relationship test and not the compelling state interest one.

1. 93 S. Ct. 705 (1973).

2. Doe v. Bolton, 93 S. Ct. 739 (1973). The decision is important apart from *Wade* because *Bolton* involved an attack on a relatively liberal abortion law adopted by Georgia in 1968, GA. CODE ANN. § 26-1202 (1972). The Court determined that in spite of the liberal nature of the statute it nevertheless could not stand in view of the standards established in *Wade*. The statute established certain procedural requirements that must be met before an abortion could be performed. These included requirements that the abortion be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals; that the operation be approved by the hospital staff abortion committee; and that the performing physician's judgment be confirmed by independent examinations of the patient by two other licensed physicians. The Court held these requirements unconstitutional as having no rational relation to the statute's purposes, as being unduly restrictive of the patient's rights already safeguarded by her physician, and as being an undue infringement on the physician's right to practice. The statute's residency requirement was found to violate the privileges and immunities clause of the Constitution by denying protection to persons entering Georgia for medical services.

terminate her pregnancy, subject only to very limited interference from the state. This note will discuss two of the constitutionally significant aspects of the *Wade* decision—the Court's determination that the question was a proper one for judicial resolution under the due process clause and the Court's decision that the right of privacy includes the abortion decision. A brief analysis of the common-law and modern legislative attitudes concerning abortion is helpful in understanding the Court's holding in *Wade*.

It is generally accepted that under the English common-law abortion before "quickening" was not a crime.[3] Similarly, most American courts have ruled that abortion of an unquickened fetus was not criminal.[4] Some writers believe that a thorough analysis of common-law history supports the conclusion that women had the common-law liberty of abortion at every stage of gestation.[5] This belief was not shared by all of the early American courts, however, and several early decisions found the abortion of a quickened fetus to be a misdemeanor.[6] In 1821 Connecticut became the first state to adopt abortion legislation.[7] The statute[8] punished abortion of a quickened fetus but set no penalty for abortion of a fetus before quickening. Most of the early statutes dealt severely with abortions of a quickened fetus but prescribed very lenient punishment for abortion prior to that stage.[9] During the later decades of the nineteenth century, however, legislators began to dispense with the quickening distinction and began to prescribe much harsher penalties. By the end of the 1950's most states had banned abortion except when necessary to preserve the mother's life.[10]

Various factors have been advanced to explain enactment of these

3. Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730, 731 (1968). "Quickening" is the first recognizable movement of the fetus in the uterus. It appears usually from the sixteenth to eighteenth week of pregnancy. 93 S. Ct. at 716.

4. *See, e.g.*, Edwards v. State, 79 Neb. 251, 252, 112 N.W. 611, 612 (1907); Miller v. Bennett, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949).

5. *E.g.*, Means, *The Pheonix of Abortional Freedom: Is A Penumbral or Ninth-Amendment Right About To Arise from the Nineteenth-Century Legislative Ashes of A Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335, 336-75 (1971).

6. *E.g.*, Smith v. State, 33 Me. 48, 55 (1851); Lamb v. State, 67 Md. 524, 533, 10 A. 208, 208 (1887).

7. Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 435 (1961).

8. CONN. STAT. tit. 22, § 14 (1821).

9. Quay, *supra* note 7, at 437.

10. For a good survey of state abortion legislation and important judicial decisions on the subject *see* Quay, *supra* note 7, at 447-526.

highly prohibitive criminal abortion statutes. First, Victorian ideals of morality were elevated above the right of a married couple to choose if and when to have children.[11] These ideals fostered the belief that the primary function of sexual activity was procreation and that all attempts at abortion and contraception should therefore be prohibited. Secondly, legislators began attempting to shield the woman from the unskilled abortionist by enacting what they considered to be protective legislation.[12] Thirdly and most significantly, the surgical procedure involved in an abortion was dangerous because of the lack of modern antiseptic techniques and anitibiotics.[13] There is also some authority for the proposition that the legislators were concerned with the protection of prenatal life.[14]

Beginning in the 1950's a movement was initiated to liberalize the abortion laws. The initial objective was to accomplish this change through the legislative process, and to this end the American Law Institute proposed a statute allowing certain therapeutic abortions.[15] Fourteen states adopted some form of the American Law Institute proposal.[16]

In 1965 *Griswold v. Connecticut*[17] opened the door for *judicial* resolution of the abortion question. In *Griswold* the Court struck down a Connecticut statute[18] preventing the use of contraceptives on the ground that it violated a marital right of privacy found in the penumbras of the Bill of Rights. A concurring opinion noted that "the entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."[19] After this decision the judicial attack on abortion legislation was quickly mounted. In *People v. Belous*[20] the California Supreme Court recognized that "the fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right to privacy' or 'liberty' in matters relating to mar-

11. Lucas, *supra* note 3, at 732.
12. *Id.*
13. Means, *supra* note 5, at 382-91.
14. Roe v. Wade, 93 S. Ct. 705, 725-26 (1973).
15. MODEL PENAL CODE § 230.3 (Proposed Draft 1962).
16. Roe v. Wade, 93 S. Ct. 705, 720 n.37 (1973). This list includes N.C. GEN. STAT. § 14-45.1 (Supp. 1971).
17. 381 U.S. 479 (1965).
18. Act of March 28, 1879, ch. 78, [1879] Conn. Acts 428 (repealed 1969).
19. 381 U.S. at 495 (Goldberg, J., concurring).
20. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

riage, family, and sex."[21] Numerous suits challenging abortion statutes were brought in both federal and state courts, and a split of authority developed over the question.[22] The Supreme Court addressed itself in *Wade* to this diversity in the lower courts.

The Court was called upon to determine the constitutionality of the Texas abortion statute, which permitted abortion only "by medical advice for the purpose of saving the life of the mother."[23] After resolving the issue of standing[24] and reviewing the major historic attitudes concerning abortion,[25] the Court held that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of per-

21. *Id.* at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.

22. Some courts struck down abortion statutes. Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972), *vacated and remanded*, 93 S. Ct. 1412 (1973); Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972); YWCA v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972); Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971), *vacated and remanded sub nom.* Hanrahan v. Doe, 93 S. Ct. 1410 (1973); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970); State v. Barquet, 262 So. 2d 431 (Fla. 1972).

Other courts upheld the statutes. Crossen v. Kentucky, 344 F. Supp. 587 (E.D. Ky. 1972), *vacated and remanded*, 93 S. Ct. 1413 (1973); Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated and remanded*, 93 S. Ct. 1411 (1973); Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970); Rosen v. Board of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970); Cheaney v. State, — Ind. —, 285 N.E.2d 265 (1972); State v. Abodeely, — Iowa —, 179 N.W.2d 347 (1970); State v. Munson, — S.D. —, 201 N.W.2d 123 (1972), *vacated and remanded*, 93 S. Ct. 1416 (1973).

23. 93 S. Ct. at 709.

24. 93 S. Ct. at 712-15. The suit was brought by a single pregnant woman, a doctor who had been arrested for violating the Texas abortion statute, and a married couple without children. The Court ruled that the latter two plaintiffs lacked standing to sue, that the doctor alleged no federally protected right not assertable as a defense in the state prosecution pending against him, and that the married couple's complaint was too speculative, but the Court upheld the pregnant woman's right to challenge the statute. Because of the fact that the woman already had delivered her child, the question was technically "moot," but the Court, quoting from Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911), held that the issue was "capable of repetition, yet evading review," and therefore could be heard.

In Doe v. Bolton, 93 S. Ct. 739, 745-46 (1973), the Court granted a group of physicians standing even though they had not been threatened with prosecution for violation of the state's abortion statute. The Court granted standing because the physicians were members of the group against which the statute operates directly and therefore had a sufficiently direct threat of personal detriment. The Court believed that they should not be required to become involved in a criminal prosecution before they could seek judicial relief. The Court distinguished Poe v. Ullman, 367 U.S. 497 (1961), in which standing was denied a physician challenging a Connecticut statute prohibiting the giving of medical advice on the use of contraceptives, by noting that the Connecticut statute was adopted in 1879 and only one physician had ever been prosecuted under it. 93 S. Ct. at 746. Conversely, the Georgia statute is recent and its predecessor had been used in several prosecutions. If the Court believes that a recent and active statute may be challenged by anyone subject to prosecution under it, it appears that the standing requirement may have been expanded by the *Bolton* decision.

25. 93 S. Ct. at 715-24.

sonal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[26] The Court determined that the right of privacy is not absolute, however, and can be regulated when the state can show a compelling interest.[27]

The state has two interests in the formulation of abortion legislation: protecting the life and health of the mother and protecting potential life. Balancing these interests against those of the mother, the Court determined that the state's interest in the mother becomes compelling only after the first three months of pregnancy because prior to that time it is medically safer to have an abortion than to carry the fetus full term.[28] Therefore, prior to the fourth month "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated."[29] Between the beginning of the fourth month of pregnancy and the point where the state's interest in protecting potential life becomes compelling, the state may pass legislation reasonably related to the preservation of the woman's health.[30] The Court determined that the state's interest in protecting potential life becomes compelling at the stage of viability.[31] After that stage the state may completely proscribe abortions except where necessary "to preserve the life or health of the mother."[32]

It is significant that the Court found the question of abortion legislation a proper one for judicial resolution under the due process clause. The Court noted[33] Justice Holmes' admonition in *Lochner v. New York*[34] that the Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them

26. *Id.* at 727.
27. *Id.* at 727-28.
28. *Id.* at 731-32.
29. *Id.* at 732.
30. As examples of such legislation the Court suggested requirements based on the qualifications of persons permitted to perform abortions, the procedure to license such persons, the facility where the abortion may be performed, and the licensing of the facility. *Id.*
31. *Id.* Viability is the point at which the fetus is potentially able to live outside the mother's womb. It is usually placed at about seven months but may occur at an earlier time. *Id.* at 730.
32. *Id.* at 732.
33. *Id.* at 709.
34. 198 U.S. 45 (1905).

conflict with the Constitution of the United States."[35] In *Lochner* the Court had invalidated state legislation designed to regulate working hours among bakery employees in the State of New York. The statute was held to violate the right to contract that the Court found to be a liberty protected by the fourteenth amendment. Justices Harlan[36] and Holmes,[37] in vigorous dissents, felt that the Court had no authority to hold that the statute violated the due process clause. *Lochner* typified what is now known as the era of substantive due process, which lasted for three decades. This constitutional policy was designed to prevent legislative control over business, and it placed the burden of justifying legislation upon the state. It required the invalidation of economic regulatory legislation unless the state could clearly prove its relation to the public welfare, a burden that was extremely difficult to carry.[38] The *Lochner* approach was applied by the Court to invalidate various state regulatory statutes.[39] But *Nebbia v. New York*[40] and several subsequent cases[41] later firmly rejected this theory. The final blow was dealt by Justice Black in *Ferguson v. Skrupa*:[42] "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."[43]

This repudiation of the *Lochner* substantive due process approach has given the defenders of abortion legislation a weapon to use to persuade courts that the matter of abortion was one strictly for the legislatures. Some judges adopted this approach, believing that the question involved the weighing of values that should be accomplished by the legislators.[44] There appears to be a distinction, however, between

35. *Id.* at 76 (Holmes, J., dissenting).
36. *Id.* at 74.
37. *Id.* at 75-76.
38. *See* Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13, 22 (1958).
39. *E.g.*, Coppage v. Kansas, 236 U.S. 1 (1915).
40. 291 U.S. 502 (1934).
41. *E.g.*, Lincoln Union v. Northwestern Metal Co., 335 U.S. 525 (1949); Olsen v. Nebraska, 313 U.S. 236 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
42. 372 U.S. 726 (1963).
43. *Id.* at 730.
44. *See* Crossen v. Kentucky, 344 F. Supp. 587, 591 (E.D. Ky. 1972), *vacated and remanded*, 93 S. Ct. 1413 (1973); Abele v. Markle, 342 F. Supp. 800, 812 (D. Conn. 1972) (dissenting opinion), *vacated and remanded*, 93 S. Ct. 1412 (1973); Corkey v. Edwards, 322 F. Supp. 1248, 1254 (W.D.N.C. 1971), *vacated and remanded*, 93 S. Ct. 1411 (1973); Doe v. Scott, 321 F. Supp. 1385, 1395 (N.D. Ill. 1971) (dissenting opinion), *vacated and remanded sub nom.* Hanrahan v. Doe, 93 S. Ct. 1410 (1973); State v. Barquet, 262 So. 2d 431, 440 (Fla. 1972) (dissenting

the *Lochner* type of substantive due process and that used in *Wade* to invalidate state abortion legislation. The difference is between judicial review of legislation affecting personal, fundamental rights essential to preserving the guarantees of freedom in our society and legislation dealing with economic regulation and control of an industrialized nation.[45] Several Supreme Court decisions have applied substantive due process criteria in the area of personal, fundamental rights.[46] The Court in *Griswold* apparently recognized this distinction:

> [W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* . . . should be our guide. But we decline that invitation. . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch *economic problems, business affairs,* or *social conditions.* This law, however, operates directly on an intimate relation of husband and wife . . . .[47]

If the Court in *Wade* has accepted this distinction in the application of substantive due process criteria without clearly acknowledging it[48] and has determined that a fundamental, personal right is involved, the discredited *Lochner* theory should be no barrier to determining the constitutionality of a state regulatory statute. The risk that the Court will substitute its judgment for that of the legislature in determining what is wise economic or social policy is inherent in our system of judicial review. The basic problem is not whether a court may review acts of the legislature but rather how wisely it utilizes this power to identify, appraise, and weigh the competing interests. De-

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opinion); Cheaney v. State, — Ind. —, —, 285 N.E.2d 265, 269 (1972); State v. Munson, — S.D. —, —, 201 N.W.2d 123, 127 (1972), *vacated and remanded,* 93 S. Ct. 1416 (1973).

45. *See* Emerson, *Nine Justices in Search of A Doctrine,* 64 MICH. L. REV. 219, 224 (1965); Lucas, *supra* note 3, at 756.

46. *E.g.,* Aptheker v. Secretary of State, 378 U.S. 500 (1964) (right to travel); Wieman v. Updegraff, 344 U.S. 183 (1952) (right of association); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to direct child's education); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to marry, establish a home, and bring up children).

In Bolling v. Sharpe, 347 U.S. 497 (1954), the Court applied the due process clause of the fifth amendment to strike down segregation in the District of Columbia public schools.

47. 381 U.S. at 481-82 (emphasis added). The holding in *Griswold,* however, was not based on the due process clause. Justice Goldberg, concurring in *Griswold,* recognized that a state may experiment with economic legislation but not with fundamental rights. 381 U.S. at 496. However, he was not speaking for the majority of the Court.

48. In *Wade* Justice Stewart discussed the substantive due process problem but did not draw any distinction between economic and personal rights. 93 S. Ct. at 733-34 (concurring opinion). In another concurring opinion, Justice Douglas mentioned the problem in a footnote. *Id.* at 758 n.4.

fining the right involved and determining the appropriate standard to be applied to legislation affecting that right are two basic aspects involved in this type of judicial review. "To refuse to recognize a right claimed to be basic to our constitutional order for fear that the Court, in exercising its power to protect that right, will employ a standard whereby it usurps the legislative function in determining basic social policy obscures analysis of the Court's role and denies the Court's resourcefulness in employing standards appropriate to the particular case."[49]

Having examined the method apparently adopted by the Court to review state abortion legislation, it is necessary to discuss the substantive right which the Court found to be within the fourteenth amendment's concept of personal liberty and restrictions on state action. The Court found that the right of privacy includes a woman's decision whether or not to terminate her pregnancy.[50]

Although the right of privacy is not explicitly mentioned in the Constitution, it has been recognized by the Court since 1891.[51] The roots of that right have been found to exist in the first amendment,[52] the fourth and fifth amendments,[53] and ninth amendment;[54] in the penumbras of the Bill of Rights;[55] and in the concept of liberty guaranteed by the fourteenth amendment.[56] It has been applied by the Court to protect various aspects of the family relationship.[57] Finally in *Griswold* the right was first recognized as an independent doctrine,[58] and it has recently been affirmed as applicable to the protection of the family relationship.[59]

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49. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case,* 64 MICH. L. REV. 235, 258 (1965).

50. 93 S. Ct. at 727.

51. In Union-Pacific R.R. v. Botsford, 141 U.S. 250, 251 (1891), the Court noted: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

52. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969).

53. *See* Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 n.5 (1967); Boyd v. United States, 116 U.S. 616 (1886).

54. Griswold v. Connecticut, 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring).

55. *Id.* at 484-85.

56. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

57. Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (education of children); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (child rearing).

58. *See* Emerson, *supra* note 45, at 228.

59. The Court in Eisenstadt v. Baird, 405 U.S. 438 (1972), said, "If the right

In order to find whether this right should be applied to abortions the Court in *Wade* had first to determine that the right to an abortion was "fundamental," for "only personal rights . . . deemed to be 'fundamental' . . . are included in this guarantee of personal privacy."[60] The only justification given by the Court in granting such status to the abortion decision was the possible detrimental effects on the mother if she were compelled to deliver the child. These included direct physical harm, a distressful future life, impairment of mental and physical health due to child care, and the possible stigma attached to an unwed mother.[61] Although these are certainly weighty considerations, perhaps the Court should have elaborated more fully its finding that the abortion decision is a "fundamental" right. "Fundamental" has been defined as being "implicit in the concept of ordered liberty,"[62] as being "rooted in the traditions and conscience of our people,"[63] and as one of "those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' "[64] Since the state is required to demonstrate a compelling interest in order to regulate any fundamental right[65] and since statutes must be narrowly drawn so not to exceed this interest,[66] it is hazardous for the Court to grant "fundamental" status without sufficient justification, for if it does, a significant number of state regulations may be in jeopardy. In addition to examining the effects of an unwanted child on the woman, the Court might have noted that "the *Griswold* decision rested upon the broadest and most sweeping principles of substantive constitutional law"[67] and that the abortion right might be considered more important than the rights involved in *Griswold*. The use of contraceptives could be considered a first line of defense against an unwanted child, but

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of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. Justice Stewart, concurring in *Wade*, noted that this right necessarily includes the woman's decision whether to end her pregnancy or not. 93 S. Ct. at 735.

60. 93 S. Ct. at 726. The Court relied on the test for fundamental status given in Palko v. Connecticut, 302 U.S. 319, 325 (1937), holding that the right must be "implicit in the concept of ordered liberty . . . ."

61. 93 S. Ct. at 727.

62. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

63. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

64. Powell v. Alabama, 287 U.S. 45, 67 (1932).

65. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

66. NAACP v. Alabama, 377 U.S. 288, 307 (1964).

67. Rosen v. Board of Medical Examiners, 318 F. Supp. 1217, 1234 (E.D. La. 1970) (dissenting opinion).

an abortion is definitely the final means available.[68] Then the Court would at least have established some precedent for its determination. Combined with the fact that at the time the Constitution was adopted women had the right to an abortion of a fetus before quickening,[69] these arguments would have made the finding of a fundamental right more justifiable.

Once the right to an abortion is found to be fundamental, the Court must determine the state's interests involved so that they can be balanced with the rights of the mother. It is in the process of determining the state's interests that the major differences of opinion have arisen, for there is present one highly significant factor that was not present in *Griswold*—the existence of a fetus. Even if the courts are willing to agree that the state's interest in protecting the woman's health is not sufficiently compelling to justify regulation during all stages of pregnancy, differing opinions as to the status of the fetus have made a resolution of the state's interest in protecting potential life extremely difficult.[70]

The opponents of reform point to the fact that in other areas of the law the rights of the fetus are protected.[71] Proponents counter with the observation that in all these areas the rights are protected only if the fetus is born alive or if the right reflects the parent's interests.[72] Proponents also argue that if a fetus constituted human life, the destruction of the fetus would be murder and that "no prosecutor ever returned a murder indictment charging the taking of the life of a fetus."[73] The controversy revolves around the religious and moral question of when a developing fetus acquires "life," or becomes a "human being," or attains the status of a "person." As one lower court wisely noted, "[W]e are constrained simply to conclude that the great conflict raised by this issue is beyond the competence of judicial resolution."[74] Another district court concluded, "[F]or the purposes of this decision, we think it is sufficient to conclude that the mother's interests are su-

68. *Id.* at 1237.

69. Means, *supra* note 5, at 374-75.

70. *See* Drinan, *The Inviolability of the Right To Be Born*, 17 W. RES. L. REV. 465 (1965).

71. For a discussion of the rights accorded the fetus *see* Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A.L. REV. 233, 235-44 (1969).

72. *See* People v. Belous, 71 Cal. 2d 954, 969, 458 P.2d 194, 203, 80 Cal. Rptr. 354, 363 (1969), *cert. denied*, 397 U.S. 915 (1970).

73. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA U.L. REV. 1, 10 (1969).

74. YWCA v. Kugler, 342 F. Supp. 1048, 1075 (D.N.J. 1972).

perior to that of an unquickened embryo, whether the embryo is mere protoplasm . . . or a human being. . . . "[75] This position has been criticized as being opposed to a basic concept of American law that human beings have a right to live.[76]

It appears that the issue can be viewed in such a manner that all references to "life," "human being," and "person" can become a mere battle of semantics. Adopting such an approach, the Supreme Court in *Wade* believed that no resolution of the question of when "life" begins was necessary.[77] Instead the Court treated the abortion issue as one involving state interference with individual rights and liberty that, as such, could be resolved within the framework of the Constitution.[78] Viewing the controversy in this way and recognizing the many similarities between the typical abortion statute and the Connecticut contraceptive statute struck down in *Griswold*,[79] the Court's opinion in *Wade* seems to be a proper extension of the right of privacy to protect the mother from the consequences of an unwanted child.

The fact that the Supreme Court declined to accept the district court's determination that the right of privacy was found in the ninth amendment and instead found the right to be inherent in the due process clause could indicate that at least seven justices[80] have adopted the so-called fundamental rights interpretation of the fourteenth amendment. This theory finds no necessary relationship between the fourteenth amendment and the Bill of Rights but views the due process clause as incorporating those principles "implicit in the concept of ordered liberty."[81] The divergent views expressed in *Griswold* over where the right of privacy was found[82] prompted one writer to question whether

75. Babbitz v. McCann, 310 F. Supp. 293, 301 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (1970).

76. Fox, *Abortion: A Question of Right or Wrong?*, 57 A.B.A.J. 667, 669 (1971).

77. 93 S. Ct. at 730. However, since the Court held that the state's interest in protecting potential life becomes compelling when the fetus becomes viable, it can be argued that the Court actually believes viability to be the point when life begins.

78. *See* Lucas, *supra* note 3, at 738.

79. *See* Leavy & Kummer, *Abortion and the Population Crisis; Therapeutic Abortion and the Law; New Approaches*, 27 OHIO ST. L.J. 647, 674 (1966).

80. *Wade* was a seven-to-two decision. Justice Blackmun delivered the opinion for the Court, with Justices Stewart, Burger, and Douglas concurring. Justices Rehnquist and White dissented.

81. J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL 5 (1971).

82. Justice Douglas, writing for the Court, found it in a penumbra of the Bill of Rights, 381 U.S. at 480-86. Justice Goldberg seemed to discover it hidden in the ninth amendment, *id.* at 486-99 (concurring opinion); Justices Harlan and White believed the right to be inherent in the due process clause, *id.* at 499-507 (concurring opinions). Justices Black and Stewart refused to "find" the right anywhere since it is not specifically mentioned in the document, *id.* at 507-31 (dissenting opinions).

the Court would find that rights not specified in the Bill of Rights are nevertheless protected by the due process clause.[83] The *Wade* decision has answered that question in the affirmative.

The *Wade* decision has several practical consequences in addition to its constitutional implications. The decision rendered virtually every state abortion statute invalid.[84] The so-called abortion mills in which any woman with enough money could obtain an abortion will be eliminated, along with the need for some women to travel to another state or country to obtain the services of a licensed physician. Those concerned with population control now have a legitimate tool with which to work. Competent doctors can now feel free to provide what is best for their patients without undue concern for legal interference. Most importantly, a woman who has no other hesitations about abortion will no longer be forced to evade the law. Since the decision was quite detailed, the states should have an adequate guide to the type of regulation that is now permissible. Since the leaders of the Catholic Church are violently denouncing the decision,[85] however, a struggle may emerge between the Catholic hospitals and state enforcement of the new procedure, expecially in areas where the Catholic hospital is the only one available.

In light of the *Wade* decision the Supreme Court appears to be ready to apply substantive due process standards to those rights found to be personal and fundamental, whether they are specifically mentioned in the Bill of Rights or not. In addition, the Court may apply the right of privacy to more varied situations in the future. The practical consequences of the abortion decision have evoked both criticism and praise from the various factions concerned with the abortion controversy,[86] but in the end, as one speaker has said, "this whole matter is eventually going to be resolved by the conscience of the individual who desires to have an abortion or not, to the exclusion of what the law, the moralist, or the medical profession has to say."[87]

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83. *See* Kauper, *supra* note 49, at 249.

84. It appears that only the New York abortion statute, N.Y. PENAL LAW § 125.05 (McKinney Supp. 1972), may survive the *Wade* decision. This provision allows an abortion during the first twenty-four weeks of pregnancy without qualification, if performed by a duly licensed physician with the woman's consent.

85. NEWSWEEK, Feb. 5, 1973, at 27.

86. *Id.*

87. Marchetti, *Symposium—Law, Morality, and Abortion,* 22 RUTGERS L. REV. 415, 423 (1968).